Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1686

HAROLD GUY RILEY,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

Petitioner, Harold Guy Riley, petitions this Court for a writ of Certiorari to review the judgment of the Supreme Court of Virginia.

OPINION BELOW

Petitioner filed a petition for a Writ of Error to the Supreme Court of Virginia from his conviction in Highland County Circuit Court on April 26, 1979. By its Order dated January

25, 1980, the Supreme Court of Virginia denied that Petition. That Order is appended to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

A. Whether the Clerk of a State Court not of record in Virginia is a neutral and detached magistrate for purposes of issuing a search warrant.

B. Whether the evidence offered against petitioner at trial based upon and flowing from the warrantless search and inspection of petitioner's land on August 28, 1978, was constitutionally admissible.

STATEMENT OF CASE

A. Course of Proceedings

Petitioner was tried on April 26, 1979, in

the Circuit Court of Highland County before the Honorable William S. Moffett, Jr., and a jury. The indictment charged that the petitioner did unlawfully and feloniously manufacture and possess with the intent to distribute marijuana in violation of Virginia Code §18.2-248 (1950, as amended). The jury found him guilty as charged in the indictment and fixed his punishment at seven (7) years in the Virginia State Penitentiary and a fine of FIVE THOUSAND DOLLARS ($5,000.00). Prior to trial petitioner filed a Motion to Suppress which was denied by the trial court after a hearing on February 8, 1979. His Petition for Appeal to the Virginia Supreme Court was refused by Order of that Court on January 25, 1980. The following assignments of error were contained in and argued in the Petition for Appeal:

1. The trial court erred in failing to grant appellant's Motion to Suppress Evidence obtained pursuant to the search warrant when the affidavit for its issuance was not certified by the issuing officer to the Clerk of the Circuit Court.

2. The trial court erred in failing to grant appellant's Motion to Suppress Evidence obtained pursuant to the search warrant when the affidavit for its issuance was not signed.

3. The trial court erred in refusing to allow defense counsel to cross-examine the toxicologist as an adverse witness and in requiring defense counsel to first exhibit adversity prior to permitting cross-examination, and in failing to set aside the verdict on this basis.

4. The trial court erred in refusing to give appellant's proposed instruction as to accommodation.

5. The trial court erred in failing to set aside the verdict because of exculpatory or material evidence not produced at trial by the Commonwealth or furnished to appellant upon request.

6. The trial court erred in failing to grant appellant's Motion to Strike the Evidence and to set aside the verdict on the basis that the Commonwealth failed to establish a complete chain of evidence establishing identity of analyzed specimen offered into evidence.

7. The trial court erred in refusing to grant appellant's Motion to Suppress Evidence obtained pursuant to the search warrant issued by the District Court Clerk instead of a magistrate.

8. The trial court erred in failing to grant appellant's Motion to Suppress Evidence obtained pursuant to the search warrant because the affidavit upon which it is based does not satisfy the fourth amendment.

9. The trial court erred in failing to grant appellant's Motion to Set Aside the Verdict because it subjects the appellant to cruel and unusual punishment.

10. The trial court erred in failing to grant appellant's Motion to Suppress Evidence obtained pursuant to the search warrant due to a prior, warrantless, unreasonable search wherein the state police obtained evidence from which subsequent evidence was derived.

B. Facts:

On August 27, 1978, Virginia State Trooper D. W. Orebaugh received a complaint from an unnamed citizen that marijuana was growing on the petitioner's property in Highland County. The trooper went with the citizen that same day to a point one thousand (1,000) yards north of

of petitioner's property and allegedly viewed a marijuana patch on his property. On August 28, 1978, Trooper Orebaugh entered the petitioner's property and personally viewed three (3) marijuana patches. On August 29, 1978, Trooper Orebaugh appeared before Leona H. Gutshall, Clerk for the Highland County General District Court, and secured a warrant to search the property of the petitioner. Later that same day, Trooper Orebaugh along with other law enforcement officers, entered onto the property of the petitioner with the search warrant and conducted an extensive search of the property. Six hundred and sixty pounds (660) of marijuana was allegedly seized altogether from the property.

The affidavit submitted by Trooper Orebaugh in support of the requested search warrant was never signed. In the affidavit it was alleged that an unnamed citizen had

brought complaint about marijuana growing on the petitioner's property. The search warrant specified the areas to be searched as the "premises, house, outbuildings and curtlage [sic] of Harold Guy Riley."

REASONS FOR GRANTING THE WRIT

A. Whether the Clerk of a State Court not of record in Virginia is a neutral and detached judicial officer for purposes of issuing a search warrant.

The petitioner contends that the search of his house and property on August 29, 1978, was illegal because the search warrant was not issued by a neutral and detached judicial officer. In Virginia, according to §19.2-52 (Code of Virginia 1950, as amended), search warrants "may be issued by any Judge, magistrate or other person having authority to issue criminal warrants, if he be satisfied from such complaint and affidavit that there is reasonable and probable cause for the

issuance of such a search warrant." This section of the Virginia Code does not distinguish between search warrants and other warrants. Nor does it specify that a magistrate or judicial officer must issue a search warrant. The "other person having authority" referred to in §19.2-52 above is defined further in §19.2-71 as follows:

> Process for the arrest of a person charged with a criminal offense may be issued by the judge, or clerk of any Circuit Court, any general district court, or any magistrate as provided for in Chapters 3 and 4 of this title. (Code of Virginia, 1950, as amended.)

The Supreme Court of Virginia has promulgated Rules of Court intended to provide a governing procedure in courts of record and courts not of record and before the magistrates defined in Rule 3A:1. (Rules of Court, Rule 3A:1. Scope.) Within Rule 3A:2 the following definitions are relevant herein:

> (1) Clerk includes deputy clerk;
>
> . . .
>
> (5) Magistrate means a judicial or quasi-judicial officer authorized to issue arrest and search warrants, commit arrested persons to jail or admit them to bail, or conduct preliminary hearings. Depending on the context, magistrate may refer to a judge, Clerk of any court, justice of peace, special justice, bail commissioner, committing magistrate, or other appropriate officer. [Rules of Court, Rule 3A:2(1) and (5)].

The same rules provided that a (search) "warrant shall issue only on affidavit made before or filed with a magistrate authorized to issue search warrants." (Rules of Court, Rule 3A27.) All of the language in Rule 3A:27 above concerning issuance of search warrants refers specifically to "magistrates," not to "clerks." Nonetheless, it is clear that the definitions cited above give a clerk and even a deputy clerk the authority to issue search warrants in Virginia, whether or not a magistrate is available and whether or not there are any extenuating circumstances.

The Fourth Amendment requirement that a neutral and detached magistrate must determine when an individual's right to privacy must yield to the state's need to search was enunciated by this Court in Johnson v. United States, 333 U.S. 10 (1948).

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Johnson v. United States, supra at 13-14.

This fundamental guarantee to the scrutiny of a neutral and detached magistrate was an important basis for this court's review in Coolidge v. New Hampshire, 403 U.S. 443 (1971). In Coolidge the Court repeated an admonition of Justice Bradley's from Boyd v. United States, 116 U.S. 616, 635 (1886) as follows:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that consitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.

In the case at hand, a non-judicial officer issued the warrant, and we find a purported affidavit which is not signed by the affiant. Further, the affiant makes an admission of trespass in the unsigned affidavit and the warrant was not filed in compliance with the law.

A clerk of a court should not be considered a judicial officer for purposes of issuing search warrants. This should be especially so for court clerks such as Virginia general district courts. In criminal matters they hear misdemeanor cases and preliminary hearings in felony cases. They are referred to by the

Code of Virginia as "courts not of record." Their duties are not judicial in nature but simply as clerical to the judicial role. They perform primarily administrative functions as opposed to discretionary. In many cases, particulary rural areas such as Highland County, the clerical role may be secondary to secretarial duties.

In the present matter, the Clerk issued a search warrant where the affiant alleged a felony. The petitioner received a seven (7) year penitentiary sentence. It is clear that the responsibilities of the Clerk here were more meaningful than determining the probable cause necessary for arrest warrants involving minor charges such as drunk driving, breach of peace, etc., as was found in Shadwick v. City of Tampa, 407 U.S. 345 (1972).

Petitioner concedes that in the record there is nothing to suggest the clerk here was

involved with the police or prosecution. Nor does the record contain any indication of the qualifications, experience or tenure of this clerk. Petitioner suggests that the court must draw the line in allowing clerks of courts to have authority to issue search warrants.

The virtually unlimited reported cases in the state and federal courts involving search warrants and their affidavits showing the subject's complexity, make it abundantly clear that a true judicial officer, not a clerk, is constitutionally required for issuance. This issue was not decided in Shadwick, supra. The instant case presents the issue squarely for review by this Court. Is a court clerk a judicial officer for Fourth Amendment purposes to grant a search warrant?

B. Whether the evidence offered against petitioner at trial based upon and flowing from a warrantless search and inspection of his land

on August 28, 1978, was constitutionally admissible.

On August 29, 1978, Trooper Orebaugh appeared before Leona H. Gutshall, Clerk of the Highland County District Court for the purpose of obtaining a search warrant of petitioner's real estate. The affidavit form (as provided by Rule 3A:27 of the Rules of the Supreme Court of Virginia) was not signed by the Trooper. The unsigned affidavit said that the warrant was to search for marijuana which was being manufactured on petitioner's land. In response to the form used, the grounds for search and seizure were established by the following facts: (Trooper Orebaugh said)

> . . . on 8-28-78 Trooper D. W. Orebaugh entered the above property after receiving a citizen's complaint of marijuana growing there and observed three marijuana patches.

On an earlier part of the affidavit form the trooper said he based his belief that the

marijuana could be found at those premises on the following facts:

> He bases his belief that such property can be found on the following facts. On August 27, 1978, Trooper D. W. Orebaugh received a citizen's complaint of marijuana growing on the above property and a sample of marijuana from the citizen. Trooper D. W. Orebaugh went to a location 1000 yards north of the above property with the citizen and viewed the marijuana patch.
>
> On August 28, 1978, Trooper D. W. Orebaugh entered the above property and personally viewed three (3) marijuana patches. The first 4/10 mile south of the above residence approximately 20' by 20' containing approximately 200 plants. The second, approximately 150 yards west of #1 containing approximately 17 plants, and the third 7/10 mile south of the above residence at a brown chestnut board barn with approximately 25 plants on the west side of the barn. All three on Harold G. Riley's property, and all three have been cultivated and fertilized. At patch #1 there is evidence that the plants are being harvested, stalks and loose leaves scattered about on the ground. There are paths leading from patch to patch and to a dirt road that goes to Harold G. Riley's residence.

In Harris v. United States, 390 U.S. 234, 236 (1968) this Court held, citing decisions

back to 1924, that a police officer who saw an object in plain view could lawfully seize such as long as the officer "has a right to be in the position to have that view . . . ."

In the instant matter, but for Trooper Orebaugh's warrantless intrusion onto petitioner's property, it is highly doubtful whether he would have had sufficient probable cause the next day to get the search warrant.

What the trooper did on August 28, 1978, was to conduct an exploratory search of petitioner's acreage to determine whether marijuana was growing there. The day before he had looked at the property from one thousand (1000) yards off. On August 28th he went onto petitioner's land. According to both the affidavit and his testimony at the suppression hearing, while on petitioner's property, he got as close as 4/10 of a mile to the house.

In a line of cases from Johnson v. United

States, 333 U.S. 10 (1948), Jeffers v. United States, 342 U.S. 48 (1951), Chapman v. United States, 365 U.S. 610 (1961) to Stoner v. California, 376 U.S. 483 (1964), this court has ruled inadmissible evidence seized from a dwelling, hotel room or garage where a warrantless illegal entry was made. Here, it is submitted, Trooper Orebaugh made an illegal entry upon petitioner's land which cannot be later redeemed by a search warrant.

Petitioner is requesting the Court to hold that evidence seized under authority of a warrant where a prior illegal entry has been made on the land of the accused and where such warrant could not have been obtained without such illegal entry, is constitutionally inadmissible. This field at 4/10 of a mile from petitioner's dwelling house could not be considered part of the curtilage, as that term has become used. United States v. Taylor, 428 F2d. 515, 518 (8th Cir. 1970).

Petitioner is requesting the Court to do away with the curtilage doctrine as it has developed in state and federal courts. See, e.g., Taylor, supra; Patler v. Commonwealth, 211 VA 448 (1970).

As the bemused District Court said in the "wild duck" case, United States v. Greenhead, Inc., 257 F.Supp. 890, 892 (1966):

> A long and settled line of cases has established that a mere trespassory entry onto open land will not, in and of itself, vitiate an otherwise lawful search . . . .

As has been said by this Court as recently as Zurcher v. Stanford Daily, 436 U.S. 547 (1978) and Michigan v. Tyler, 436 U.S. 499 (1978), it is privacy and the reasonable expectation thereof that the Fourth Amendment protects. The expectation of privacy of the home now means that a warrantless arrest may not be effected there without the presence of exigent circumstances. Payton v. New York, ___ U.S. ___, 48 L.W. 4375 (April 15, 1980).

The privacy expectation for the land should be granted the same protection as the home. Perhaps for many the expectation of privacy for their farm land or wood land is a great in fact as it is for their dwelling house.

The doctrine of curtilage is antiquated and bears no relationship to modern life. Traditional American notions of the high regard of property go well beyond the dwelling house and very much includes the land. It seems illogical to conclude that there is no high interest and expection of privacy in one's land, yet at the same time acknowledging the landowner the right to procure a criminal trespass warrant against any interloper. Nor was this unoccupied land. Petitioner lived on this land and worked this land.

While upon the lands of petitioner, Trooper Orebaugh, by his own words in the affidavit and at the suppression hearing, was engaged in a

search upon petitioner's land. As indicated by the affidavit, he traversed much of petitioner's land in his search for marijuana fields. At this point he had no warrant and was conducting an exploratory, warrantless search. As this Court said in Tyler, supra: [quoting Camara v. Municipal Court, 387 U.S. at 528-529 (1967)]

> And under that Amendment, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without prior consent is "unreasonable" unless it has been authorized by a valid search warrant. Michigan v. Tyler, supra, at 506. [Emphasis added.]

Such rule should be applied to land and to petitioner's land herein.

CONCLUSION

It is respectfully submitted by petitioner that the evidence used against him was constitutionally inadmissible. A writ of certiorari should be granted to determine the two important

issues raised herein.

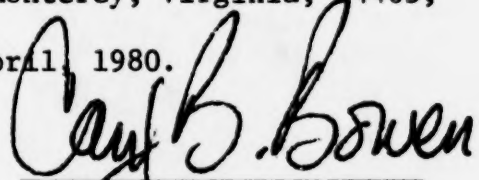
Respectfully submitted,

HAROLD GUY RILEY

By
Cary B. Bowen
Robert P. Geary

CERTIFICATE

I hereby certify that three copies of this Petition for a Writ of Certiorari were mailed to Marshall Coleman, Esquire, Attorney General for the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219, and to George E. Dudley, Special Prosecutor, Monterey, Virginia, 24465, on this 24 day of April, 1980.


Cary B. Bowen

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 25th *day of* January, 1980.

Harold Guy Riley, Appellant,

against Record No. 791113

Commonwealth of Virginia, Appellee.

From the Circuit Court of Highland County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee $175.00 plus his costs and expenses

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk